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No. 14-6873

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2014

MARK A. CHRISTESON

Petitioner,

v.

DONALD ROPER, WARDEN,

Respondent.

ON
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

Imminent Execution Scheduled
12:01 a.m. CDT on October 29, 2014

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QUESTIONS PRESENTED FOR REVIEW

1. Does an actual conflict of interest meet the "interests of justice" standard established in *Martel v. Clair*, 132 S.Ct. 1276 (2012), and require substitution of conflict free counsel for conflicted counsel appointed under 18 U.S.C. §3599?

2. Whether counsel appointed under 18 U.S.C. §3599, who procedurally defaulted the client's federal habeas application by untimely filing the petition, should continue their court appointment and determine the existence of, and plead, their own abandonment and/or egregious misconduct warranting equitable tolling of their client's statute of limitations under *Holland v. Florida*, 560 U.S. 631 (2010)?

PARTIES TO THE PROCEEDING

Petitioner is Mark A. Christeson, who was Petitioner-Appellant below.

Respondent is Donald Roper, Warden of Potosi Correctional Center, who was Respondent-Appellee below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Mark A. Christeson respectfully petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

CITATIONS TO OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit issued a summary affirmance of the decision of the District Court for the Western District of Missouri. The district court's decision is on pages 374a-377a of the Appendix. The court of appeals' summary affirmance is on pages 447a-448a of the Appendix.

JURISDICTION

On October 21, 2014, counsel of record entered her appearance in the district court for the limited purpose of moving that court for substitution of 18 U.S.C. §3599 appointed counsel and filed that motion on Petitioner's behalf. App. 341a, 344a. The district court denied that motion on October 22, 2014. App. 375a. Petitioner appealed the same day. App. 379a. The Eighth Circuit summarily affirmed the district court on October 24, 2014. App. 448a. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

18 U.S.C. §3599(a) provides, in relevant part: "In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys."

28 U.S.C. §2244(d)(1) provides, in relevant part: "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."

STATEMENT OF THE CASE

I. MR. CHRISTESON'S APPOINTED COUNSEL CONCEALED THE DISMISSAL OF HIS UNTIMELY FEDERAL HABEAS PETITION FOR NINE YEARS YET THE LOWER COURTS NOW REFUSE TO REPLACE THE CONFLICTED ATTORNEYS TO PERMIT LITIGATION OF EQUITABLE TOLLING

Mark Christeson is the only man on Missouri's death row to have been denied any federal review of his trial court judgment. He faces his imminent execution with an, at best, simplistic understanding of the collapse in his legal process, having been told only on May 4, 2014 the basic fact that his federal case had been dismissed over seven years earlier.

Mr. Christeson's federal district court-appointed attorneys abandoned him before his one-year habeas corpus statute of limitations had run out in April 2005, failing to even meet him for the first time until six weeks after that deadline and then filing his petition nearly four months out of time. Earlier this year, the appointed counsel expressly acknowledged, in both the Missouri Supreme Court and the United States District Court for the Western District of Missouri, the existence of their conflict of interest against Mr. Christeson concerning his grounds for equitable tolling of the statute of limitations.

But the lower federal courts, first alerted to this conflict on May 23, 2014, months before the setting in September of Mr. Christeson's execution date, have repeatedly refused to substitute counsel for the appointed lawyers who abandoned Mr. Christeson, filed his petition long out-of-time, and then concealed their failings in the ensuing years. For nearly a decade, appointed counsel obscured their abandonment surrounding the April 2005 deadline by exploiting their client's profound mental incapacity and isolation within his prison.

In April 2014, in the throes of Missouri's current wave of executions, Mr. Christeson's appointed counsel finally solicited consultation on their default of his federal habeas corpus review. Instead of offering candor, appointed counsel's subsequent conduct advanced their reputational interests over Mr. Christeson's legal interests, bringing their unmistakable conflict of interest to light.

Months of briefing in the district court and court of appeals culminated in the district court's denial of Mr. Christeson's motion for substitution of counsel. Yet that order, while invoking the "interests of justice" standard articulated in *Martel v. Clair*, 132 S.Ct. 1276, 1284 (2012) (Kagan, J.) (unanimous), studiously avoided speaking to the entire point of the months of proceedings, *viz.*, appointed counsel's conflict of interest with Mr. Christeson. Before this Court is the Eighth Circuit's order summarily affirming that district court order of October 22, 2014. The decisions below bind Mr. Christeson to his conflicted counsel, who have clung to their appointment in order to litigate zealously in the interest of their professional reputations and at the expense of Mr. Christeson's precarious legal interest.

II. THE FEDERAL STATUTORY RIGHT TO COUNSEL IS MR. CHRISTESON'S ONLY SAFEGUARD

Mr. Christeson remains indigent, as he had been throughout his entire state court proceedings. The Missouri State Public Defender System provided his counsel for his trial, direct appeal, and state collateral review. Section 3599 of Title 18 of the U.S. Code codifies the right to counsel for prisoners "who seek federal habeas relief from a state death sentence, for all post-conviction proceedings and related activities." *Clair*, 132 S.Ct. at 1283-84, citing *McFarland v. Scott*, 512 U.S. 849, 854-55 (1994), *Harbison v. Bell*, 556 U.S. 180, 183-85 (2009).

In 2004, the last public defender to represent Mr. Christeson in state court prepared and filed for him in the district court a nominally *pro se* motion for the appointment of two St. Louis area solo practitioners, Eric Butts and Phil Horwitz. The district court granted their appointment under 18 U.S.C. §3599. Virtually every capital federal habeas petitioner in Missouri obtains their counsel this way, as reflected in the fact that counsel of record for each of the ten men executed in Missouri in the past eleven months were appointed pursuant to §3599.[1] Butts and Horwitz promptly abandoned Mr. Christeson, not even meeting with him for the first time until more than *six weeks after his petition's filing deadline* had passed, nearly eleven months after their appointment.

Absent funding from within the §3599 scheme, it is impossible for Mr. Christeson to replace appointed counsel with volunteer lawyers in order to investigate and litigate the bases for reopening his federal habeas case with a Rule 60(b) motion concerning the equitable tolling of the limitations period. This would be true in relation to a garden-variety case, but Mr. Christeson's is anything but that, as his observable cognitive impairments require significant expert services in order to begin to adequately determine their extent, a factor that could be decisive in the equitable tolling analysis. This utter impracticality has been compounded by the

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[1] Unlike other highly active capital jurisdictions, neither of the Federal Defender Offices in the Missouri district courts have ever had a Capital Habeas Unit. Further, in the event of a derailment of the federal capital post-conviction process, Missouri provides no alternative resource for prisoners to find a replacement by volunteer counsel. Monthly-scheduled executions since November 2013 have deeply submerged Missouri's small private capital defense bar in the swell of warrant litigation for their extant clients. The frequency of executions has even overwhelmed the Missouri Department of Corrections, necessitating establishment, effective July 1, 2014, of a Missouri Supreme Court Rule limiting the number of executions to one per month. Mo. S.Ct. R. 30.30 (revised July 1, 2014). The unrelenting wave of executions has eliminated any prospect of a qualified Missouri practitioner intervening *pro bono*, and without a substitution appointment, to repair the breach of Mr. Christeson's federal statutory right to counsel.

recalcitrance of conflicted counsel in withholding disclosure of their file, the most crucial source of information and evidence concerning the equitable tolling analysis of 28 U.S.C. §2244(d)(1).

III. After Many Years, The Condition Of Mr. Christeson's Case Came To Light

A. Mr. Christeson's Appointed Counsel Solicited Attorney Consultation In Preparing The Response To His Show Cause Order

In 2004, Mr. Christeson's petition for a writ of habeas corpus was due on or before April 10, 2005. Butts and Horwitz, however, did not file the petition until August 5, 2005, well after the expiration of the one-year limitations period. The district court dismissed the petition as untimely on January 31, 2007, noting that "Christeson does not argue that extraordinary circumstances in this case justify equitable tolling." App. 419a, 455a. The court of appeals then summarily denied a certificate of appealability on May 29, 2007. App. 456a.

On April 7, 2014, the Missouri Supreme Court entered a show cause order for Mr. Christeson concerning the setting of his execution date, calling for his response by May 7, 2014, as the court had repeatedly done in the weeks and months prior to issuing Mr. Christeson's

order.[2] App. 37a. It had done the same a few months earlier for another client of Butts and Horwitz, Mr. William Rousan.[3]

In recent years, Butts and Horwitz had joined Messrs. Rousan and Christeson as parties to multi-plaintiff litigation concerning Missouri's capital punishment, signing on to the efforts of the given lead attorneys. Typically, one or more of the lead attorneys in these actions were from the Death Penalty Litigation Clinic (DPLC) in Kansas City, the sole public interest law office in Missouri handling capital litigation pursuant, typically, to court appointment.[4]

Butts and Horwitz solicited consultation from capital defense practitioners about potential grounds for the equitable tolling of the one-year limitations period that they had widely missed for Mr. Christeson.. App. 10a-11a. A staff attorney from the DPLC directed them to the undersigned counsel (Ms. Jennifer Merrigan and Mr. Joseph Perkovich). App. 11a.

Over the course of several phone calls in April 2014 with Merrigan and Perkovich, Butts and Horwitz indicated they had gathered that *Holland v. Florida*, 560 U.S. 631 (2010), could

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[2] On July 1, 2013, the Honorable Mary B. Russell began her two-year term as Chief Justice of the Missouri Supreme Court. The same day, the Missouri Attorney General's Office moved that court to set execution dates for Messrs. Joseph Franklin and Allan Nicklasson. On August 14, 2013, the court entered execution warrants for both men. The court had not ordered, and the State had not carried out, an execution in approximately two and-one-half years. As scheduled, Missouri executed Mr. Franklin on November 20, 2013. Also as scheduled, the State executed Mr. Nicklasson on December 12, 2013.

Thereafter, for the men sentenced to death and considered to have exhausted their appeals, the Missouri Supreme Court began issuing orders to show cause as to why an execution warrant should not be entered. In turn, that court began setting executions at generally a four-week interval. In the first three months of 2014, Missouri proceeded to execute three men.

[3] On January 29, 2014, the high court entered a show cause order for Mr. William Rousan's execution, instructing him to file his reply by February 11, 2014. *State v. Rousan*, Mo. Supreme Court, SC79566. Messrs. Eric Butts and Philip Horwitz, solo practitioners in the St. Louis area, were counsel of record for Mr. Rousan in the Missouri Supreme Court. They filed his response. On March 21, 2014, the Missouri Supreme Court set Mr. Rousan's execution for April 23, 2014.

[4] The clinic is dedicated to the representation of capital defendants and is the only entity of its type focused on death penalty defense advocacy in Missouri. However, the office is not a capital resource center and is funded through court appointment in direct representations.

offer Mr. Christeson equitable relief from their procedural default of his federal habeas review. They recognized they could not be the attorneys to litigate the issue, as it would involve investigating and presenting evidence of their own conduct after their appointment as Mr. Christeson's counsel. Merrigan and Perkovich then agreed to travel from the East Coast to St. Louis in order to meet Mr. Christeson and to review Butts and Horwitz's file.

On April 15, 2014, in the midst of these discussions, Butts wrote Mr. Christeson to inform him that eight days earlier, the Missouri Supreme Court entered an order to show cause as to why Mr. Christeson should not be executed. The letter stated:

> **the request** by the State of Missouri [sic] **does not mean that an execution date will be set in your case anytime in the near future**. As you are no doubt aware, counsel for most of the other *Zink* [lethal injection federal] litigation plaintiffs have received similar requests within the past few days. It appears that **the State of Missouri** [sic] **is doing nothing more than administratively reviewing all of the capital cases pending in the state**.

App. 84a (emphasis added). Eight days later, as scheduled, Missouri carried out the execution of Butts and Horwitz's other capital client, Mr. Rousan, at 12:01 a.m. CDT on April 23, 2014, pursuant to the Missouri Supreme Court's March 21, 2014 warrant, entered upon its January 29, 2014 show cause order.

On May 4, 2014, at the behest of appointed counsel Butts and Horwitz, Mr. Christeson met with Merrigan and Perkovich in the Potosi Correctional Center for approximately three and-a-half hours. App. 11a. After explaining that they were meeting at the request of his appointed counsel in order to assess the circumstances of his federal habeas petition's dismissal, it became

apparent that Mr. Christeson was confused. Mr. Christeson did not know that his petition for a writ of habeas corpus had been dismissed. After explaining further that his case was dismissed in January 2007 because it was filed too late, Mr. Christeson responded that he believed that his "appeals" were ongoing. He was unaware that he had never obtained federal review of his trial.

Mr. Christeson further indicated that he had met and communicated with Butts and Horwitz only infrequently over the years since their appointment—appointed counsel would later aver to having visited Christeson on four occasions over the ten years of their appointment (App. 93a-101a)—and that for years neither attorney had accepted his phone calls.

Mr. Christeson explained that during the past two years he was helped by a fellow-inmate in writing the "main litigation office in Jefferson City" to help get his appointed attorneys to respond to him. App. 8a. Upon investigation, it was determined that the requests were to the Office of the Chief Disciplinary Counsel (OCDC), an agency of the Missouri Supreme Court responsible, *inter alia*, for investigating allegations of misconduct by lawyers. App. 8a-9a, 82a, 83a. Mr. Christeson said he had tried to express that, for years, he had great trouble in communicating with Butts and Horwitz and that his requests for information had been ignored. It later became apparent that in recent years, Mr. Christeson has attempted to obtain the assistance of multiple attorneys after Butts and Horwitz had ceased to respond to him at all.[5]

By the end of the May 4, 2014 meeting with Mr. Christeson, he asked Merrigan and Perkovich to represent him. Undersigned reiterated that although they were happy to assist his

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[5] On July 20, 2013, Mr. Christeson, with the assistance of a follow inmate, lodged a complaint with the OCDC about Butts and Horwitz's neglect. App. 9a, 82a. In March 2013 and again in December 2013, Mr. Christeson wrote the above-mentioned DPLC, the public interest law office in Kansas City, Missouri, to request the assistance of counsel. App. 9a. DPLC forwarded his letters to Butts and Horwitz. *Id.* On February 2, 2014, Mr. Christeson was assisted again in filing another complaint with the OCDC. Butts and Horwitz were notified about each of these complaints and requests. App. 83a, 101a.

appointed counsel, they were meeting with him only in order to assist his appointed attorneys in helping him. App. 12a.

B. Mr. Christeson's Appointed Counsel Demonstrated Their Actual Conflict By Pleading Against His Legal Interests

On May 5, 2014, the day after meeting with Mr. Christeson, Merrigan and Perkovich met with Butts and Horwitz in Horwitz's suburban St. Louis office to review their file and to consult with them about their forthcoming response to Mr. Christeson's show cause order, which was due on May 7. App. 37a.

Butts and Horwitz refused any review of their file, even after additional repeated oral and written requests and despite explaining to them its relevance to a claim of equitable tolling. App. 12a. They refused to discuss their conduct and performance prior to their late filing of the federal habeas petition. Instead, Horwitz provided access to a conference room containing only the files of Mr. Christeson's state court attorneys, Missouri public defenders.

During the May 5 meeting, undersigned counsel emphasized that Butts and Horwitz's response should not take a position adverse to their client and explained this meant that, as future witnesses in relation to any equitable tolling litigation, the appointed counsel should make no representations about the circumstances surrounding the untimely habeas petition. App. 13a-14a. Nevertheless, the response that Butts and Horwitz filed took positions adverse to Mr. Christeson, emphasizing their own purported diligence in a self-serving manner and possibly misleading the Missouri Supreme Court:

> Appellant's habeas petition was dismissed as untimely filed by the district court. . . . Appellant strongly believes the district court was incorrect in its calculations. Appellant, through counsel, vigorously litigated this issue both in the district court and in the court of appeals without obtaining relief. Of issue before the district court was the 31 day period that the district court did not believe [sic] was tolled for purposes of calculation of the one year filing deadline for a federal petition filed pursuant to 28 U.S.C.

> §2244(d)(1)(A). Appellant believes that he timely filed his petition for writ of habeas corpus.

App. 45a.

Butts and Horwitz's response in the Missouri Supreme Court did acknowledge their inherent conflict in relation to prospective *Holland* litigation. Butts and Horwitz explained that it was their desire "to insure [sic] that appellant has been able to pursue every possible ground of relief provided by law," including a claim they referred to as "*Holland* inquiry." App. 48a. Butts and Horwitz recognized that they "would be essential witnesses to factual questions indispensable to a *Holland* inquiry." *Id.* On this basis, they acknowledged their "[u]nwaivable ethical and legal conflicts" that prevented their ongoing representation. *Id.*

They made their request to the Missouri Supreme Court clear. According to Butts and Horwitz, new counsel had to be appointed: "Conflict free counsel must be appointed to present the equitable tolling question in federal district court. It is anticipated that the aforementioned outside counsel will expeditiously present the matter of equitable tolling to the federal district court, and upon appointment, litigate the availability of federal review as to Mr. Christeson." App. 48a-49a.

C. The Notice By Friends Filed In The District Court Submitted The Attorneys' Conflict Against Mr. Christeson Warranting Substitution Of Counsel

The acknowledgment of the conflict by Butts and Horwitz precipitated Merrigan and Perkovich's filing a notice of the conflict in federal district court.[6] App. 1a, 12a, 35a. The notice was filed pursuant to the professional obligations of undersigned counsel to address the actions of the attorneys who solicited their involvement in the capital representation of Mr. Christeson

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[6] Undersigned counsel, Merrigan and Perkovich, filed the Notice By Friends Of The Court Of Petitioner's Need For Substitution By Conflict-Free Counsel on May 23, 2014 ("Notice By Friends"), acting as "Friends of the Court in Behalf of Petitioner, Mark A. Christeson." App. 1a.

but proceeded, against undersigned counsel's advisement, to conduct his representation in advancement of their reputational interests and at the expense of Mr. Christeson's liberty interest. Mo. Rules Prof. Cond., Preamble, R. 5.2, R. 8.3(a); Ann. Mod. Rules Prof. Cond. §1.7. App. 137a. The intention was to notify the court of the need to substitute conflict-free counsel.

Although Butts and Horwitz initially recognized their conflict of interest, after the notice to the district court of the conflict, their position changed dramatically. Ever since the notice, Butts and Horwitz have vigorously defended their conduct (and inaction) in relation to Mr. Christeson, and opposed the substitution of counsel. App. 101a-104a. Despite newly maintaining the position that no substitution is required and despite being aware, since April, of the necessary step of bringing a Fed.R.Civ.P. 60(b) motion, they have done nothing to vacate the judgment dismissing Mr. Christeson's habeas action. *See Gonzalez v. Crosby*, 545 U.S. 524, 535-36 (2005) (Rule 60(b) motion may challenge ruling dismissing §2254 as time-barred).

D. Mr. Christeson's Case Presents Prima Facie Grounds For Equitable Tolling

1. The Available Record Reflects Attorney Abandonment When Mr. Christeson's Federal Petition Was Due

On May 14, 2004, promptly following the conclusion of state post-conviction review (*infra* at 18-19), the Missouri public defender then representing Mr. Christeson filed a nominally *pro se* motion in the Western District of Missouri for the appointment under §3599 of Butts and Horwitz. App. 451a. District Judge Whipple granted the motion on July 2, 2004, contingent, *inter alia*, on the submission of a budget. *Id.* On July 28, 2004, Butts and Horwitz submitted the required budget, which included a request for a neuropsychiatric expert. *Id.* The docket reflects there were no further filings for more than a year, when appointed counsel filed their out-of-time federal petition on August 5, 2005. *Id.*

Butts and Horwitz have averred that they in fact did not meet Mr. Christeson for the first time until May 27, 2005 (App. 93a), more than six weeks after their April 10, 2005 habeas deadline. It is apparent that that initial client consultation was the first action taken in the attempted resumption of their actual representation of Mr. Christeson following their extended abandonment while his one-year limitations period ran down and, finally, out.

Appointed counsel's file is critical to any determination of their actions during the time relevant to the April 10, 2005 filing deadline. Reviewing the file, especially with regard to their client correspondence and interview memoranda—*i.e.*, indicia of their contact and communication with the client—was the main impetus for undersigned counsel, upon Butts and Horwitz's invitation, traveling to St. Louis on the eve of the date for Mr. Christeson's response to the Missouri Supreme Court's show cause order. Despite that expressed purpose for the meeting, appointed counsel refused to supply any access to their file. To date, Butts and Horwitz have failed to produce any documentation reflecting communication or contact with Mr. Christeson before their acknowledged first meeting with him on May 27, 2005.

Further, in their rehearsal of communications with Mr. Christeson after they had missed his filing deadline (which they submitted in defense of their performance and in opposition to substitution by conflict-free counsel), they noted their first correspondence to him was not sent until August 15, 2005, ten days after they filed their very untimely habeas petition. App. 94a. A glance at that late federal petition betrays its gross inadequacy. The petition is 52 pages total and omits many claims that would have been properly presented via their exhaustion in the state post-conviction process.

Appointed counsel proceeded to chronicle their periodic correspondence after their first letter (on August 15, 2005), and to note their inclusion of Mr. Christeson in multi-plaintiff

actions concerning Missouri's lethal injection protocol. App. 94a-97a. Butts and Horwitz's survey of their correspondence after they procedurally defaulted Mr. Christeson's petition and their recital of actions taken in litigations other than the federal habeas case fail to address the central facts concerning Mr. Christeson's representation. Until just months ago, Mr. Christeson simply did not know that his petition had been dismissed and believed that his sporadic communication from his appointed attorneys concerned his federal case for which they were originally appointed in 2004. App. 11a-12a. Mr. Christeson's inability to reach the attorneys and to receive any information about his federal habeas case caused him to seek, guided by fellow inmates, the intervention of the bar's disciplinary authority and the death penalty public interest law office in Kansas City (*supra* at 8 n.5).

2. Without Meaningful Assistance Of Counsel, Mr. Christeson's Profound Cognitive Impairments and Low Intelligence Foreclose His Understanding And Protecting His Legal Interests

In the course of the proceedings initiated with the Notice By Friends (App. 1a), and culminating in the October 21, 2014 Renewed Motion By *Pro Bono* Counsel For Substitution Of 18 U.S.C. §3599 Appointed Counsel (App. 343a), *infra* at 24, the profound level of Mr. Christeson's mental impairments and his isolation within the Potosi Correctional Center emerged.

Mr. Christeson had no comprehension of the actual status of his legal proceedings. Undersigned counsel informed him in the May 4, 2014 meeting that his federal case had been dismissed seven years earlier. Mr. Christeson was unable to recall the names of any of his attorneys during his state collateral review under Missouri Rule 29.15 and on his direct appeal in the Missouri Supreme Court. 217a, 334a. Mr. Christeson could only remember the first names of his trial attorneys, but not their surnames. *Id.*

Mr. Christeson has not retained any working understanding of the significance of the April 7, 2014 Missouri Supreme Court show cause order. App 218a. His requests for legal assistance within the prison are unintelligible to the law clerks. App. 218a-19a.

That Mr. Christeson labored under substantial cognitive impairments was readily apparent to undersigned counsel from their first visit with him. App. 386a. After further interaction, Mr. Christeson's severe impairments are unmistakable. He presents marked deficits in written and verbal communication and severe impairments in working memory and concentration. He suffers chronic and severe headaches. Mr. Christeson was in special education throughout his schooling but nonetheless received primarily failing grades.

Mr. Christeson's school achievement testing largely included scores in the second and third percentile. *Id.* His school performance dropped precipitously between elementary school and junior high school, from low-average in the third grade to the first percentile in seventh grade. In recognition of Mr. Christeson's impairments, appointed counsel included funding for a neuropsychological evaluation in their budget filed with the district court. App. 451a. However, they never retained an expert or conducted even a rudimentary investigation.

After the Supreme Court's decision in *Holland v. Florida*, 560 U.S. 631 (2010), at least four federal circuits have held that a petitioner's inability to understand and protect his own legal interests can warrant tolling of the statute of limitations that Butts and Horwitz missed. *Davis v. Humphreys*, 747 F.3d 497, 499-500 (7th 2014) (Easterbrook, J.); *Ata v. Scutt*, 662 F.3d 736, 742 (6th Cir. 2011); *Bills v. Clark*, 628 F.3d 1092, 1097 (9th Cir. 2010); *Riva v. Ficco*, 615 F.3d 35, 40 (1st Cir. 2010). At least two others had held the same before *Holland* was decided. *See Bolarinwa v. Williams*, 593 F.3d 226, 231 (2d Cir. 2010); *Hunter v. Ferrell*, 587 F.3d 1304, 1309-10 (11th Cir. 2009). These holdings are in keeping with the more general rule that federal

statutes of limitations may be tolled by the mental incompetence of a person who would otherwise be barred by them. *See Barrett v. Principi*, 363 F.3d 1316, 1319-20 (Fed. Cir. 2004) (collecting cases).

3. Mr. Christeson's Isolation Within Prison Enabled His Appointed Attorneys To Obscure The Procedural Default of His Federal Habeas Case

Inmates in the Potosi Correctional Center lack direct access to information about pending cases. App. 219a. Even inmates able to understand dockets and legal filings must rely on their counsel to update their status.

Any ability Mr. Christeson might have had, in general, to seek help about his case was effectively foreclosed by his experience in Potosi. The Potosi institution is distinctive among prisons housing death sentenced inmates in that those prisoners are comingled with the general prison population rather than separated on a row. Among the consequences for Mr. Christeson has been the lack of a place for him to seek out help in understanding the legal process and his representation concerning his capital case. App. 220a. The effects of this general void have been compounded for Mr. Christeson due to the nature of his conviction, which involved the murder of two children and their mother and a sex offense against the latter.[7] Mr. Christeson was twenty years old when he entered Potosi and his youth "made him a target" for predators. App. 220a-221a.

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[7] As a fellow inmate put it:

> If your case involves sex crimes with children or if you hurt children[,] that is not good. Prisoners with those types of crimes are thought of and treated worse than trash. They are frequently attacked. They are stabbed, beated to a coma, killed turned into a 'punk' (sexually), and sexually victimized in other ways. [A fellow inmate] recalls one incident in which one prisoner had a 'stinger' (a metal rod used to heat liquids) shoved into his rectum.

App. 229a-31a.

In November 2000, shortly after his arrival, he was attacked by two prisoners and sustained serious head injuries. App. 254a-56a, 264a. During the attack, he lost consciousness. Mr. Christeson was admitted to the infirmary and placed on 24-hour observation. He was then transferred to protective custody, for his own safety, where he remained for an indefinite period lasting at least 18 months.[8]

According to newspapers, a corrections officer tipped off the offenders about Mr. Christeson's crime, precipitating the severe beating. *See* "Prison Justice Takes a Pretty Nasty Turn," *The Southeast Missourian*, April 24, 2001. Further, in April 2001, the two assailants sent copies of their disciplinary paperwork and letters to the editor of the Maries County Gazette, bragging about what they had done to Mr. Christeson.

The prisoners were charged internally and sanctioned with one year in disciplinary segregation or "The Hole." "Inmates Offer Their Condolences to the Brouk Family: Currently Serving One Year in "the Hole" for Assaulting Christeson," *Maries County Gazette*, April 4, 2001. According to the prison's own policies, this length of a sentence was indicative of the gravity of the assault. Ordinary assault is a Class I infraction and carries up to 30 days in disciplinary segregation. App. 225a. Though the assailants could have been prosecuted of a Class B felony (*id.*), they were not. Their actions were essentially endorsed by prison officials. *See* "Inmates Publicize Retribution on Children's Killer," *The Southeast Missourian*, April 17, 2001. According to Missouri DOC spokesperson Tim Kneist, it was "not an unusual occurrence to

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[8] According to the prison's handbook:

> A Protective Custody Unit is housing that provides separation of offenders from the general population of the facility. If an offender can provide information which verifies the need for separation from other offenders, or if staff has reason to believe the offender's safety may be jeopardized, the offender may be housed in a Protective Custody Unit. App. 225a.

have a fight in a maximum-security prison ... The unusual part of the story is to write a letter to the newspaper and tell everybody they did this ... I read that and I just kind of shook my head. There's something new every week." *Id.*

In the years following this assault and his emergence from protective custody in or around mid-2002, Mr. Christeson repeatedly returned to protective custody for his safety. App. 222a-21a. This step, while necessary for his self-preservation, increased his isolation from sources of potential legal assistance by fellow inmates or the law library. The specialized knowledge concerning capital post-conviction litigation is well beyond the scope of experience of the law clerks in protective custody. App. 238a. In any event, the lack of confidentiality is a general and pervasive barrier for inmates sharing information about their case. This barrier is insurmountable in regard to crimes such as Mr. Christeson's. Given his initiation to the ways of Potosi via the November 2000 corrections officer-sanctioned attack, self-preservation effectively eliminated his access to assistance.

E. Appointed Counsel's Procedural Default Deprived Mr. Christeson Of His First Federal Habeas Review

1. Mr. Christeson's State Collateral Review Is Owed No Federal Deference

The breakdown in Mr. Christeson's federal representation has, to date, deprived him of his first federal habeas review of his state court judgment, a deprivation of "an important liberty interest." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). This left standing the problematic ruling from Mr. Christeson's state collateral review via the Missouri Rule 29.15 post-conviction motion proceedings. The following exceptional features of those proceedings call for federal scrutiny more so than any habeas corpus case in Missouri's federal courts since the enactment of AEDPA in 1996.

David Darnold, Mr. Christeson's trial judge, was no longer a Missouri judge after losing his re-election bid following Mr. Christeson's 1999 conviction in the Vernon County Circuit Court. Yet the recently elected circuit judge whom the voters had chosen to replace Darnold was prevented from hearing Mr. Christeson's post-conviction claims under the normal operation of Missouri Rule 29.15. Instead, the Missouri Supreme Court (by a November 16, 2001 order of Limbaugh, J.), appointed Mr. Darnold as a "Senior Judge" for the single purpose of presiding over Christeson's post-conviction motion. App. 347a. Senior Judge Darnold then disposed of Mr. Christeson's Missouri Rule 29.15 motion by signing and dating—without editing—a 170-page order entirely drafted by the Attorney General's Office. *Id.* The Missouri Supreme Court then affirmed that ruling on May 11, 2004. *Christeson v. State*, 131 S.W.3d 796 (Mo. 2004). Mr. Christeson's state post-conviction review was flawed beyond the point of vitiating any federal deference warranted by the fundamental principle of comity. *Jefferson v. Upton*, 560 U.S. 284, 287 (2010). Despite being patently unworthy of federal deference, no federal review, deferential or otherwise, was forthcoming due to Butts and Horwitz's procedural default.

However, the Missouri public defenders who represented Mr. Christeson in his state collateral review, despite the defective process, exhausted dozens of significant constitutional violations. But, Butts and Horwitz's late-filed federal petition, just 52 pages in length, would fail to plead almost all of those issues in the Missouri Rule 29.15 proceedings.

2. Mr. Christeson's First Federal Habeas Review Would Submit Compelling Grounds For Relief

Among the grounds for constitutional relief that could be considered in Mr. Christeson's first federal habeas corpus review are claims deriving from a staggering array of victimization, abuse, and exploitation from Mr. Christeson's infancy through his first 18 years of life in squalor and pathology. App. 314a. At the time of the horrific triple murder for which he and his then 17

year-old cousin and co-defendant (who testified against him in exchange for being spared the death penalty in a separate prosecution), were convicted, the two had set out once again to try to run away from the custody of their cousin, David Bolin, a man they were made to call "Uncle David."[9] App. 314a-15a. As much as any grounds presented to Missouri's federal courts in the modern death penalty era, the actual conditions of Mr. Christeson's childhood—if such a personal history can be called that—and their affects on Mark would warrant mercy. *See, e.g., Wiggins v. Smith*, 539 U.S. 510 (2003).

IV. The Opinions Below Have Not Addressed The Existence Of, And Consequences From, Appointed Counsel's Conflict Against Mr. Christeson

A. Instead Of Replacing Conflicted Counsel After Being Alerted To The Conflict, The District Court Ordered Them to Continue with Their Appointment

The Notice By Friends filed on May 23, 2014 requested appointment of conflict-free counsel and a hearing to address whether Mr. Christeson was entitled to equitable tolling. App 27a. It sought substitution by conflict-free counsel "in order to investigate and prepare a motion pursuant to Rule 60(b) presenting the grounds for equitable tolling." App. 35a. In connection with this requested substitution, the Notice By Friends sought a scheduling order for the prospective Rule 60(b) motion, an order to Butts and Horwitz to preserve their file and to produce it to substitution counsel, and to grant discovery to substitution counsel in connection with the equitable tolling issues. *Id.* Further, undersigned counsel expressed their qualification, availability, and willingness to accept substitution as Mr. Christeson's counsel.

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[9] David Bolin was the landlord for an extended web of kin living in an isolated rural compound of shacks, trailers and a broken down school bus known as "Bolin Hill." For decades, Bolin has been a sexual predator upon children and otherwise criminally abusive yet he has succeeded in obtaining custody of numerous minors, like Mark Christeson and his cousin Jesse Carter, within his extended family due to the members' various incapacities and struggles. App. 314a.

On May 27, 2014, the district court *sua sponte* redocketed the Notice as a motion for appointment and ordered the state and appointed counsel to respond. App. 70a. The district court also noted that undersigned counsel were from Philadelphia and New York and, in any event, it would not appoint out of state counsel to represent Mr. Christeson because of cost concerns. On June 3, 2014, undersigned counsel filed a Motion for Reconsideration, arguing that it was inappropriate for appointed counsel to comment on their own conflict and offering not to charge the court for travel fees and expenses. App. 71a.

After requesting two extensions, on June 16, 2014, Butts and Horwitz filed a Response to the Court's Order, emphasizing their own diligence in filing the petition (four months late) and attempting to rebut the assertion that they misled their client about his federal petition's dismissal. Appointed counsel did this by betraying the dates and content of attorney-client communications between 2005 and 2014. App. 93a-101a. Further, appointed counsel appear to credit the Notice By Friends with alerting them to "the possible existence of a mental health or psychological issue" (notwithstanding their initial–and unused–authorization for neuropsychiatric expert services and the inclusion in the state record of neuropsychiatric issues). 102a. To that end, Butts and Horwitz then misapplied *Holland v. Florida* to Mr. Christeson's case, patently undermining the pursuit of equitable tolling. App. 103a-104a.

Butts and Horwitz's pleading asserted that "counsel herein have contacted a psychologist in order to arrange for a psychological/mental health evaluation of Mr. Christeson. Mr. Christeson has advised counsel herein that he will participate in a psychological/mental health evaluation." App. 102a. It was subsequently determined that appointed counsel had not, in fact, broached this matter at all with Mr. Christeson prior to making that representation to the district

court. App. 121a. Further, Butts and Horwitz did not so engage any expert in the months after that filing of June 16.

On July 10, 2014, the district court summarily denied the "Motion to Appoint Counsel" and ordered that Butts and Horwitz "shall continue to represent Petitioner." App. 169a.

B. Undersigned Counsel Entered Limited Appearance In Order To Appeal From The District Court's Order Denying Substitution

On August 11, 2014, undersigned counsel (Merrigan) entered her limited appearance in the district court on Mr. Christeson's behalf pursuant to Mo. Prof'l Conduct Rule 4-1.2(c), for the limited purpose of appealing from the July 10, 2014 order. App. 458a. The Eighth Circuit docketed the appeal on August 12, 2014, under Appellate Case 14-2896.

On August 15, 2014, Respondent moved to dismiss the appeal, raising three grounds in as many paragraphs. Mr. Christeson timely responded on August 25, 2014. App. 171a, 175a.

On September 5, 2014, Merrigan also filed a Notice of Limited Appearance of Counsel in the Missouri Supreme Court, alerting the high court to the pendency of the foregoing litigation in the Eighth Circuit. *State v. Christeson*, Mo. Supreme Court, SC82082.

On September 8, 2014, the Eighth Circuit *sua sponte* directed the parties "to address whether Jennifer Merrigan and Joseph Perkovich have standing to appeal." Mr. Christeson timely filed the ordered briefing on September 18, 2014. App. 183a.

On Friday, September 19, 2014, the Missouri Supreme Court entered Mr. Christeson's execution warrant for 12:01 a.m. CDT, on October 29, 2014. On Monday, September 22, 2014, Mr. Christeson, through undersigned counsel, docketed a notice in the Eighth Circuit of the Missouri Supreme Court's execution warrant. App. 465a. The next day, Respondent filed a notice by the State of Missouri of the same warrant. *Id.*

On September 29, 2014, Respondent filed his ordered briefing on standing. App. 185a. Mr. Christeson moved for leave to reply supplying points and authorities in reply on October 1, 2014 and requesting expedited briefing in light of the pending execution date. App. 465a. At the instruction of the clerk, Mr. Christeson refiled, lodging a discrete reply brief of four pages on October 3, 2014. App. 194a. On October 8, 2014, the court of appeals granted leave and filed the reply. App. 465a. On October 14, 2014, Mr. Christeson moved in the Court for a remand to the district court for an evidentiary hearing based on new evidence concerning Mr. Christeson's prison circumstances. App. 211a.

On October 15, 2014, the Eighth Circuit entered an unsigned order stating, in its entirety: "The court orders that this appeal be dismissed for lack of jurisdiction because attorneys Merrigan and Perkovich lacked standing in the district court. The motions by Merrigan and Perkovich for remand and for leave to file and ex parte supplemental argument are denied as moot." App. 240a.

C. The Eighth Circuit's Dismissal for Lack of Standing Returned Mr. Christeson's Case To The District Court For Correction Of Any Jurisdictional Defect And An Immediate Return To The Court Of Appeals

The next morning, on October 16, 2014, Merrigan filed her Amended Entry of Appearance before the district court for the "limited purpose of moving the Court by her simultaneously filed Motion By *Pro Bono* Counsel For Substitution Of 18 U.S.C. §3599 Appointed Counsel." App. 242a. She noted that Appellant "qualifies for such limited representation under Prof'l Conduct Rule 4-1.2(d)(2) because counsel is representing him in her institutional capacity with the Saint Louis University School of Law." *Id.*

On Friday, October 17, 2014, the district court entered an order near the close of business denying the Motion for Substitution for lack of jurisdiction, noting that the Eighth Circuit had

not yet entered its mandate.[10] App. 300a. Shortly after, the Eighth Circuit formally issued its mandate pursuant to Fed. R. Civ. P. 41(a). App. 301a.

In the evening of October 17, undersigned counsel filed in the Eighth Circuit a Request for Order Directing the District Court to Accept Filing. The Request sought relief from the court of appeals because of the district court's foregoing order proscribing Merrigan from filing any further pleadings. App. 303a.

On Monday evening, October 20, 2014, Respondent filed an opposition to the foregoing Request. The next morning, on October 21, 2014, Mr. Christeson filed a Reply to the State's Opposition.[11] App. 332a. Later on October 21, the court of appeals "ordered that Attorney Jennifer Merrigan is permitted to file a renewed motion for substitution of counsel in the District Court." Immediately, Merrigan did so, filing her Renewed Amended Entry of Appearance (App. 340a), and then the Renewed Motion by *Pro Bono* Counsel for Substitution of 18 U.S.C. §3599 Appointed Counsel (App. 343a), expressly incorporating the record in the prior proceedings under the Notice By Friends (App. 349a) and, which the district court denied by an order the next day, on October 22, 2014. App. 347a. Mr. Christeson immediately noticed his appeal from that denial. App. 378a.

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[10] The district court, however, also entered the following:

> Assuming, *arguendo*, that the Court has jurisdiction, the Motion is DENIED for the reasons previously stated by the Eighth Circuit, this Court, by Petitioner's counsel, and by Respondent. The Court further finds that Merrigan's duplicative Motion is an attempt to improperly delay the proceedings in this case. Absent an Order from this Court or from the Eighth Circuit, Merrigan and Perkovich are prohibited from filing any additional documents in this case. Merrigan may, however, file a notice of appeal of this Order.

App. 300a.

[11] The reply addressed, *inter alia*, Respondent's accusations of Mr. Christeson's delay in the proceedings by pointing out that the substitution issue was presented to the district court in May, long before an execution date was set and it is Respondent who has sought two separate extensions of time before filing court ordered briefing. App. 332a.

The morning of October 27, 2014, the Eighth Circuit docketed the order summarily affirming the district court's denial now before this Court. App. 447a.

REASONS FOR GRANTING THE WRIT

The Court's recent unanimous decision in *Martel v. Clair*, 132 S.Ct. 1276 (2012), determined that district courts are to apply an "interests of justice" standard when deciding a motion for substitution of appointed counsel pursuant to 18 U.S.C. §3599. The "interests of justice" inquiry is "peculiarly context-specific," wherein the "timeliness of the motion; the adequacy of the district court's inquiry into the defendant's complaint; and the asserted cause for that complaint" should bear upon the decision. *Id.* at 1287. However, *Martel* posits that a "court would have to appoint new counsel if the first lawyer developed a conflict with or abandoned the client." *Id.* at 1286.

This case presents whether lower federal courts can simply flout *Martel*'s holding on the eve of a man's execution. These courts have faulted Mr. Christeson for not becoming aware of his appointed counsel's conflict against him much earlier when his attorneys effectively concealed the fact from him, exploiting his profound cognitive impairments and, due to his personal vulnerability, isolation in prison from access to viable legal assistance.

The Court should grant review in order to clarify that the "interests of justice" standard requires substitution for conflicted counsel generally and especially when the client is unusually vulnerable due to mental incapacity or otherwise, such as the Petitioner at bar.

I. The Eighth Circuit And District Court Ignored This Court's Unanimous Opinion In *Martel v. Clair* By Not Replacing the Originally Appointed Counsel Now Laboring Under an Actual Conflict

The order of the Western District of Missouri denying substitution of Mr. Christeson's court-appointed counsel recognized that the "interests of justice" standard applies to substitution

motions. App. 375a. The tortuous litigation in that court and the court of appeals since May 2014 has made the appointed counsel's conflict against Mr. Christeson unmistakable, especially given that the conflicted attorneys had expressly acknowledged their actual conflict in the Missouri Supreme Court weeks before commencement of these federal proceedings.

A. Appointed Counsel Unmistakably Labored Under An Actual Conflict

In relation to the anemic habeas petition filed 117 days out-of-time on August 5, 2005, Butts and Horwitz carry an actual conflict of interest due, on the one hand, to their professional and reputational interests concerning their conduct when they broadly missed their filing deadline in this capital case and, on the other hand, to Mr. Christeson's need to reopen his dismissed federal habeas application under any cognizable grounds.

As recognized in *Maples v. Thomas*, a "significant conflict of interest" arises after counsel misses a crucial deadline because, *inter alia*, the "strongest argument" for the client to overcome the default becomes the fact that counsel had earlier abandoned him. 132 S.Ct. 912, 925 n.8 (2012).

The actual conflict here precludes appointed counsel from litigating the circumstances of their untimely filing and equitable tolling. Specifically, the *Holland* analysis contemplates "extraordinary circumstances," 560 U.S. at 649, quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005), in relation to the conduct of counsel, 560 U.S. at 652. The level of attorney misconduct under this high standard contemplates that the given attorney "violated fundamental canons of professional responsibility." *Id.* at 652-53 (citing Brief of Legal Ethics Professors et al. as *Amici Curiae* ("describing ethical rules set forth in case law, the Restatements of Agency, the Restatement (Third) of the Law Governing Lawyers (1998), and the ABA Model Rules of Professional Conduct (2009)").

Any inquiry directed to determining whether an attorney is responsible for such violations necessarily places the lawyer's interests in conflict with the client's. The specter of a disciplinary action before the Missouri Supreme Court concluding with the given attorneys being found to have violated certain professional responsibility rules would present serious concern for any practitioner. Such an action could result in sanctions such as a public reprimand and the monitoring of the given law practice. *See, e.g., In re Harris*, 890 S.W.2d 299 (Mo. banc 1994). Further, disciplinary proceedings, in extreme cases, may lead to disbarment or indefinite suspension. *In re Crews*, 159 S.W.3d 355 (Mo. banc 2005)

"A conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and *adversely affected by the lawyer's own interests*." Restatement (Third) of Law Governing Lawyers (2000) §121 The Basic Prohibition of Conflicts of Interest (emphasis added).

The specific details underneath Butts and Horwitz's divergent interests from Mr. Christeson's implicate their fiduciary obligations and cause Mr. Christeson unmistakable prejudice. "When the lawyer's interest in nondisclosure conflicts with the client's interest in the representation, then a fiduciary duty of disclosure is implicated." 3 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* §24:5 at 545 (2008 ed.), *quoted in Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609, 629 (8th Cir. 2009) (cited in support of withdrawal of conflicted counsel).

The absence of any inquiry into conduct during that timeframe, whether by the district court or via substitution of counsel to investigate and litigate the matter, rendered Mr. Christeson unprotected from the interests of Butts and Horwitz in obscuring their conduct from any scrutiny. *See Sallie v. Humphrey*, 789 F.Supp.2d 1351, 1364 (M.D. Ga. 2011) (ruling that counsel who

filed late federal petition must be replaced in order to permit investigation and litigation of equitable tolling issue).

Further, Butts and Horwitz not only have unwaivable ethical and legal conflicts against Petitioner in relation to the grossly missed AEDPA filing deadline. They also bear such conflicts due to their conduct *after* the dismissal of that petition.

As years elapsed following the 2007 dismissal, appointed counsel appear to have misled Mr. Christeson in their contact with him—albeit such contact by correspondence and visitation was infrequent and limited. Mr. Christeson ceased to receive information, which prompted his effort, with the help of another inmate, to write the OCDC and others (*supra* at 8 n.5).

Moreover, the impetus for these complaints—that appointed counsel had perennially failed to apprise their client of the basic legal status of his case—contravened the law governing lawyers. *See* Restatement (Third) of the Law Governing Lawyers §20 ("a lawyer must keep a client reasonably informed about the matter" and must "promptly comply with reasonable requests for information"); *see also* Restatement (Second) of Agency §381 ("an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have").

B. The Interests of Justice Dictate That An Actual Conflict Requires Substitution Of Counsel

Judge Whipple's order utterly ignores the central question posed by the Renewed Motion by *Pro Bono* Counsel for Substitution of 18 U.S.C. §3599 Appointed Counsel (App. 343a): does the capital petitioner's appointed counsel labor under a conflict against him? That question is ignored, it is submitted, because, as the foregoing indicates, there can only be one answer: yes.

The district court, and thereafter the panel of the Eighth Circuit that affirmed its order, should not escape the consequences the existence of that conflict hold for the substitution

motion: a "court would have to appoint new counsel if the first lawyer developed a conflict with or abandoned the client." *Martel*, 132 S.Ct. at 1286. *Martel* constrains the lower courts that face comparable circumstances as those here. The lower courts in Mr. Christeson's case have simply ignored the clear effect of this Court's recent unanimous opinion and this Court should grant review in order to address this abuse of the newly issued standard.

C. The Lower Courts Failed To Respect Other Interests Of Justice Criteria

Furthermore, the decisions incorrectly applied the elements of the "interests of justice" standard that they did address. The district court ruled Mr. Christeson's motion untimely because it was "not filed until 2014, and shortly before Petitioner's execution date." App. 375a-76a. While the initial motion alerting the court to a conflict and the need for substitution of counsel was filed in 2014, it was filed in May, over five months prior to Mr. Christeson's execution date and nearly four months before the date was even scheduled. App. 1a.

Mr. Christeson has been diligently attempting to obtain a substitution of counsel to replace his federally appointed conflicted counsel for the past six months, that is, since the time he learned of their conflict of interest. Though the court faults Mr. Christeson for the seven-year delay in moving for substitution, it is silent as to the source of the delay: his appointed counsel's active misleading of him about the status of his appeal and his incapability, due to severe cognitive impairments, of asserting his own rights until lawyers, asked by his appointed counsel to visit him, informed him that his federal case had been dismissed years earlier.

The district court also found that conflicted counsel did not abandon Mr. Christeson, because, according to pleadings filed by appointed counsel, they "appeared on behalf of Petitioner in lethal injection cases and made other filings on his behalf" and "state that they have had meetings and conversations with Petitioner." App. 375a (internal citations omitted). These facts were taken directly from the pleadings of appointed counsel. They are further evidence of

appointed counsel's conflict of interest; they were pled by appointed counsel in their own defense, at the expense of their client, and in violation of his attorney client privilege. App. 128a.

The district court's rationale misconstrues Petitioner's allegation of abandonment. Petitioner alleged that appointed counsel abandoned him before the time that his habeas corpus petition was due in April 2005.

According to the appointed counsel's own admissions, their first contact with Mr. Christeson was on May 27, 2005, *six weeks after* his statute of limitations had expired. Over two months after that first meeting, the appointed attorneys filed a woefully late and inadequate petition (having retained no experts, undertaken no investigation, and filed no appendix or exhibits) and then spent the next seven years deceiving their client about the status of his appeals (when they were not ignoring his queries), and strenuously arguing their own diligence at the clear expense of the client's legal interests.

Finally, the district court held that "granting the Motion would set an untenable precedent in death penalty cases. That is, outside attorneys can toll an execution date by simply waiting until the eleventh hour and then second-guessing the work of appointed counsel." R 476a.

Mr. Christeson did not wait until the "eleventh hour" to initiate the present action. He initiated it as soon as he realized his appointed counsel's conflict of interest, literally within days of learning on May 4, 2014 that his federal case had been dismissed due to counsel's abandonment in 2005 when the petition was due. Mr. Christeson has been attempting for months to litigate this issue. Any delay since the initial filing in the district court is due to the repeated extensions granted to his appointed counsel and the State and the lower court's general handling of the matter. Delay predating these proceedings is due to the conflict of interest of Mr.

Christeson's federally appointed counsel and their attempts to cover up their own misconduct and take advantage of their client's mental incapacity.

II. The Lower Courts Flout the Guarantee of Competent Counsel

This Court's recent jurisprudence has recognized the vital importance of competent counsel in state and federal post-conviction proceedings. It has also recently articulated the standard for substituting counsel in federal habeas corpus proceedings. The courts below made decisions at the intersection of these two lines of authority and deprived both of their meaning.

Four recent cases have addressed the relationship between post-conviction counsel's professional conduct and the availability of relief in federal court.[12] *See Holland v. Florida*, 560 U.S. 631 (2010); *Maples v. Thomas*, 132 S.Ct. 912 (2012); *Trevino v. Thaler*, 133 S.Ct. 1911 (2013); *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). This case illustrates the critical importance of competent, independent counsel to ensure the availability of relief in federal court. Where an attorney's competence may give rise to an avenue for federal review, a conflict arises: the attorney faces the Hobson's choice of either arguing that the attorney's own representation at an earlier state of litigation was ineffective or not making such an argument and depriving the client of federal review.

In *Holland v. Florida*, the Court addressed "whether the AEDPA's statutory limitations period may be tolled for equitable reasons." 560 U.S. at 645. The case arose because the statute of limitations was missed by a death sentenced inmate who had sought a writ of habeas corpus.

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[12] In the courts below, the State has argued that abandonment and misconduct are the equivalent to a claim of ineffectiveness of counsel as described in *Strickland v. Washington*, 466 U.S. 668 (1984) and, as such, is not available for tolling based on section 2254(i) of Title 28. *See, e.g.*, App. 435a. This argument was squarely considered and rejected in *Clair*: "2254(i) prohibits a court from granting substantive habeas relief on the basis of a lawyer's ineffectiveness in post-conviction proceedings, not from substituting counsel on that ground." 132 S.Ct. at 1287 n.3.

Id. There, an attorney's "professional misconduct could amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling." *Id.* at 651. The case was remanded to the Court of Appeals "to determine whether the facts in [the] record entitle Holland to equitable tolling or whether further proceedings, including an evidentiary hearing, might indicate that respondent should prevail." *Id.* at 654. Ultimately, equitable tolling would apply if the defendant had been diligent and if there were extraordinary circumstances, including egregious professional misconduct by appointed counsel. *Id.* This Court was clear: the professional conduct of Mr. Holland's federal counsel could provide an equitable basis for tolling the missed statute of limitations.

Maples v. Thomas addressed whether state post-conviction counsel's abandonment of their client could provide cause to excuse a procedural default that would have otherwise prevented review. 132 S.Ct. at 916-17. There, Mr. Maple's lawyers failed to file an appeal that was required to exhaust available state remedies. *Id.* His lawyers left their law firm without withdrawing from the case and without informing their client or the court of their departure. *Id.* Having received no notice of their departure, Mr. Maples believed he was being represented when the time for the appeal lapsed. *Id.* For Mr. Maples, the abandonment by his lawyers constituted "cause" to excuse the relevant procedural default. *Id.* Thus, counsel's performance is relevant to the availability of federal review where claims have been procedurally defaulted because of abandonment of state post-conviction counsel.

In *Martinez v. Ryan*, the Court addressed whether the ineffectiveness of his state post-conviction counsel could serve as cause to excuse his default of a claim of ineffective assistance of his trial counsel. 132 S.Ct. at 1313. The Court held that where state post-conviction provided the first opportunity to present such a claim, the ineffectiveness state post-conviction counsel in

failing to bring a claim of trial counsel's ineffectiveness could provide cause for excusing a procedural default of the claim. *Id.* at 1320. In *Trevino v. Thaler*, the Court held that *Martinez* extended to state post-conviction regimes that do not limit ineffective assistance of counsel claims to post-conviction, but make it "virtually impossible" to raise them on direct review. 133 S.Ct. 1911, 1918 (2013). Both cases make post-conviction counsel's performance relevant to the availability of federal review.

To obtain relief under any one of these four cases, an attorney may be required to investigate and present evidence of post-conviction counsel's failings. Where the attorney investigating and presenting the unprofessional acts is the same attorney who committed them, there is a conflict. The conflict may cut off federal review that would have otherwise been available.

For this reason, the federal courts that have squarely considered the issue recognize the conflict and appoint substitute, conflict-free counsel. The courts that have addressed the situation analogous to the one here have held that substitution is required. To date, this has been in cases where a *Martinez*-based claim may, as a procedural matter, be properly presented. In such cases, the federal courts are in agreement: independent counsel must be appointed to investigate the claim. *See Gray v. Person*, 526 F.App'x 331, 334 (4th Cir. 2013) ("We find that a clear conflict of interest exists in requiring Gray's counsel to identify and investigate potential errors that they themselves may have made"); *Juniper v. Davis*, 737 F.3d 288, 290 (4th Cir. 2013) ("[A]s in *Gray*, we find it ethically untenable to require [federal habeas] counsel to assert claims of his or her own ineffectiveness in the state habeas proceedings in order to adequately present defaulted ineffective-assistance-of-trial-counsel claims under *Martinez* in the federal habeas proceedings."); *see also Tabler v. Stephens*, __ F.App'x __ 2014 WL 4954294 (5th Cir.

Oct. 3, 2014) (appointment not required where what is "really at issue is whether [petitioner] was competent to waive his postconviction rights."). Substitution of independent counsel is required "because a clear conflict of interest exists in requiring petitioner' counsel to identify and investigate potential errors that they themselves may have made in failing to uncover ineffectiveness of trial counsel while they represented petitioner in his state post-conviction hearings." *Fowler v. Joyner*, 753 F.3d 446, 462 (4th Cir. 2014).

Moreover, there is a substantial likelihood that if Mr. Christeson receives conflict-free counsel, he will be able to access equitable tolling, which would provide merits review of a petition for a writ of habeas corpus. Butts and Horwitz filed his petition 117 days out of time and then actively concealed their conflict from him over the course of years. Moreover, Mr. Christeson suffers from profound cognitive impairments and, because of the nature of his case and conditions of confinement, he has been unable to seek the assistance of the inmates around him.[13] However, equitable tolling has never been meaningfully explored because conflicted counsel represent Mr. Christeson. *See Martinez*, 132 S.Ct. at 1317 (proving an attorney's misconduct "often require[s] investigative work."). The decisions below failing to substitute counsel due to a clear conflict undermine the protections this Court has provided federal habeas

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[13] After the Supreme Court's decision in *Holland v. Florida*, 560 U.S. 631 (2010), at least four federal circuits have held that a petitioner's inability to understand and protect his own legal interests can warrant tolling of the statute of limitations that Butts and Horwitz missed. *See Davis v. Humphreys*, 747 F.3d 497, 499-500 (7th 2014) (Easterbrook, J.); *Ata v. Scutt*, 662 F.3d 736, 742 (6th Cir. 2011); *Bills v. Clark*, 628 F.3d 1092, 1097 (9th Cir. 2010); *Riva v. Ficco*, 615 F.3d 35, 40 (1st Cir. 2010). At least two others had held the same before *Holland* was decided. *See Bolarinwa v. Williams*, 593 F.3d 226, 231 (2d Cir. 2010); *Hunter v. Ferrell*, 587 F.3d 1304, 1309-10 (11th Cir. 2009). These holdings are in keeping with the more general rule that federal statutes of limitations may be tolled by the mental incompetence of a person who would otherwise be barred by them. *See Barrett v. Principi*, 363 F.3d 1316, 1319-20 (Fed. Cir. 2004) (collecting cases). This case is even more compelling where Mr. Christeson, because of his impairments, was preyed upon and defrauded by the very lawyers appointed to represent him.

petitioners, are at odds with the decisions of other federal courts, and should be reviewed. For those reasons also, the Court should grant review of the case.

CONCLUSION

For the foregoing reasons, this Court should grant this petition.

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing was forwarded via electronic mail and U.S. First Class Mail, postage prepaid, to the following address on this the 27th day of October, 2014:

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